El Paso (and opposed throughout the divestiture hearing by the United States) and on June 24, 1965, a decree of divestiture identical in form and substance with the form of decree referred to in the stipulation was entered. There was no indication in the record that the United States abandoned its position of opposition on points (1), (2), (3), (4) or (5), above, or any of them, at any time prior to the filing of said stipulation.

Within a reasonable time after it first received notice of the execution of the said stipulation, dated and filed May 24, 1965, and the substantial and belated change in the position of the United States Department of Justice reflected therein, appellant Edison, on June 11, 1965, by letter to the District Court set forth certain objections thereto. On June 22, 1965, Edison filed with the District Court its application for leave to intervene as of right, asserting that it was so situated as to be adversely affected by the District Court's disposition of the property (comprising El Paso's so-called Northwest Division, the former Pacific Northwest Pipeline Corporation system as augmented during the post-merger period) in the manner contemplated in the form of decree referred to in the aforesaid stipulation. Additionally, Edison asserted that it would be bound by the judgment of the District Court effectuating the proposed plan of divestiture and that, because of the aforesaid stipulation filed herein, it would no longer be represented adequately in this proceeding. The application to intervene, based on the aforesaid, was grounded on Rules 24(a)(3) and 24(a)(2) of the Federal Rules of Civil Procedure, respectively.[6] Alternatively, Edison's Application for Leave to Intervene asserted permissive intervention be-

[6]Edison Application for Leave to Intervene filed June 22, 1965, pages 4-5.

cause its claims and the main action in this proceeding have common questions of law and fact, such permissive intervention being grounded on Rule 24(b)(2) of the Federal Rules of Civil Procedure.[7]

On June 24, 1965, the District Court, in a ruling from the bench, denied the aforesaid application of Edison to intervene and on June 29, 1965, the District Court's formal order, signed and dated June 28, 1965, was entered denying said application. On July 23, 1965, Edison filed with the Clerk of the District Court its Notice of Appeal to the Supreme Court of the United States from the order of the District Court denying Edison's Application for Leave to Intervene.

The jurisdiction of the Supreme Court to review said order by direct appeal is conferred by the Expediting Act, Title 15 U.S. Code, Section 29, 32 Stat. 823 (1903), as amended, 36 Stat. 1167 (1911), 58 Stat. 272 (1944), 62 Stat. 989 (1948), and is sustained by the following authorities:

1. *Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 6 L. ed. 2d 604, 81 S. Ct. 1309 (1961);
2. *Sutphen Estates v. United States,* 342 U.S. 19, 96 L. ed. 19, 72 S. Ct. 14 (1951), reh. den. 342 U.S. 907, 96 L. ed. 679, 72 S. Ct. 289;
3. *Ford Motor Co. v. Bisang Bros., Inc.* (C.A. 8, Minn.), 249 F. 2d 22 (1957);
4. *Allen Calculators v. Cash Register Co.,* 322 U.S.137, 88 L. ed. 1188, 64 S. Ct. 905 (1944); reh. den. 322 U.S. 771, 88 L. ed. 1596, 64 S. Ct. 1257;

[7] *Ibid.* page 5.

5. *Missouri-Kansas Pipe Line Co. v. United States* (C. A. 3rd), 1939, 108 F. 2d 614; cert. den. 309 U.S. 687, 84 L. ed. 1030, 60 S. Ct. 887;
6. *Continental Ins. Co. v. United States,* 259 U.S. 156, 66 L. ed. 871, 42 S. Ct. 540 (1922);
7. *United States v. DuPont De Nemours & Co.,* 366 U.S. 316, 6 L. ed. 2d 318, 81 S. Ct. 1243 (1961).

Questions Presented.

The following questions are presented in this appeal:

1. Whether the appellant may intervene in this action as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure where a substantial change in the position of the United States government with respect to defendants' proposed plan of divestiture demonstrates that the interests of the appellant are no longer being adequately represented and where the appellant will be bound by the decree of divestiture.

2. Whether the appellant is so situated as to be so adversely affected by the disposition of property to the proposed new company under the decree of divestiture that it may intervene as a matter of right under Rule 24(a)(3) of the Federal Rules of Civil Procedure.

3. Whether or not the denial of intervention constitutes an abuse of discretion under the provisions of Rule 24(b)(2) of the Federal Rules of Civil Procedure.

4. Whether the mandate of the Supreme Court in *United States v. El Paso Natural Gas Company, et al.,* 376 U.S. 651, 12 L. ed. 2d 12, 84 S. Ct. 1044, will be

complied with under the terms of the divestiture decree and order entered June 24, 1965, by the United States District Court, District of Utah, Central Division.

Statement of the Interest of Edison in the Proceedings Below.

Appellant Edison is a corporation, organized under the laws of the State of California, and engaged therein as a public utility in the generation, transmission, distribution and sale of electricity in the southern California area and elsewhere; the population of the area served by Edison is in excess of 6 million people. Edison is subject to regulation by the Public Utilities Commission of the State of California, the Public Service Commission of Nevada and the Federal Power Commission.

In connection with its electric public utility business, Edison is one of the largest consumers of natural gas in the State of California (the largest in southern California); for example, in 1964 it used natural gas for over 75% of its fuel requirements for the generation of electricity, utilizing in that year over 189 billion cubic feet at a cost of approximately $65 million. The cost to Edison of continuing to supply said electric service in its service area is significantly affected by the cost to it of its fuel supplies, such fuel costs representing its largest item of cost other than taxes and labor.

In the two decades since the end of World War II the population in Edison's service territory has increased at a phenomenal rate which, along with increased usage of electricity per customer and the substantial industrial expansion in southern California accompanying said growth in population, has resulted

in tremendous increases in requirements of Edison's customers for electricity and in turn for fuel to generate electric energy. The forecast of increased electric demands and concomitant fuel requirements for the future, both short term and long range, are similarly impressive.

The Supreme Court's decision of April 6, 1964, in *United States of America v. El Paso Natural Gas Company, et al., supra,* reversing the District Court's judgment in favor of defendants, reflects the circumstance that Edison was negotiating with both defendants El Paso and Pacific Northwest for gas supplies during the period immediately preceding El Paso's acquisition of the Pacific Northwest stock. It states:

> "In July 1956 they reached a tentative agreement. Edison thereupon tried to develop within California an integrated system for distributing Canadian gas supplied by Pacific Northwest to itself and others. El Paso decided to fight the plan to the last ditch, and succeeded in getting (through a distributor) a contract for Edison's needs. Edison's tentative agreement with Pacific Northwest was terminated. Before Edison terminated that agreement with Pacific Northwest, Edison had reached an agreement with El Paso for firm deliveries of gas; and while the original El Paso offer was 40¢ per Mcf, the price dropped to 38¢ per Mcf, then to 34¢ and finally to 30¢. Thereafter, and while the merger negotiations were pending, Pacific Northwest renewed its efforts to get its gas into California.
>
> "El Paso had been interested in acquiring Pacific Northwest since 1954. The first offer from

> El Paso was in December 1955—an offer Pacific Northwest rejected. Negotiations were resumed by El Paso in the summer of 1956, while Pacific Northwest was trying to obtain a California outlet. The exchange of El Paso shares for Pacific shares was accepted by Pacific Northwest's directors in November 1956, and by May 1957 El Paso had acquired 99.8% of Pacific Northwest's outstanding stock. In July 1957 the Department of Justice filed its suit charging that the acquisition violated §7 of the Clayton Act." (376 U.S. 651, 654, 12 L.ed. 2d 12, 16.)

This Court, in ordering divestiture, recognized that with said merger Pacific Northwest was eliminated as an independent competitive force seeking to supply the California natural gas market.

El Paso's arrangement to supply gas to Edison, above referred to, was subsequently rejected by the Federal Power Commission although the volumes of gas were certificated for sale to the California market, through the Pacific Lighting companies (Southern California Gas Company and Southern Counties Gas Company of California, subsidiaries of the Pacific Lighting Corporation).[8]

The Federal Power Commission approved the El Paso-Pacific Northwest merger on December 23, 1959, but on appeal this Court reversed the Federal Power Commission's decision, holding that the antitrust proceeding which had previously been initiated in the United States District Court for the State of Utah (*United States of America v. El Paso Natural Gas Co., et al.*) should take precedence and be determined prior to the

[8] *Re El Paso Natural Gas Co.*, 22 FPC 900 (1959).

Federal Power Commission's action on the merger application.[9] Thereafter, this Court made its determination that the El Paso acquisition of the Pacific Northwest stock and assets violated Section 7 of the Clayton Act[10] prohibiting such acquisitions where the effect may be substantially to lessen competition or tend to create a monopoly, and directed the District Court to order divestiture without delay.[11] The expressed evidentiary basis on which this Court, in large measure, relied in making its determination that the said asset and stock acquisition violated Section 7 of the Clayton Act, was the prior competition between Pacific Northwest and El Paso to supply natural gas to Edison for its electric generating requirements[12] and the judgment of this Court directed the District Court to order divestiture without delay so as to restore the status quo of competition between El Paso and Pacific Northwest which existed prior to the unlawful stock acquisition and merger.[13] As stated by the Justice Department itself in the divestiture proceeding at an earlier time:[14]

> "It would seem indisputable that a divestiture in accordance with the intent and purpose of the Supreme Court, in holding that El Paso had unlawfully acquired the stock of Pacific Northwest

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[9] *California v. Federal Power Commission*, 369 U.S. 482, 8 L. ed. 2d 54, 82 S. Ct. 901 (1962).

[10] 15 U.S. Code Section 18.

[11] *United States v. El Paso Natural Gas Co., et al.*, 376 U.S. 651, 662, 12 L. ed. 2d 12, 20, 84 S. Ct. 1044 (1964).

[12] *Ibid.* 376 U.S. 651, 654-661, 12 L. ed. 2d 12, 16-19.

[13] *Cf. Reynolds Metals Co. v. FTC*, 309 F. 2d 223, and *United States v. DuPont*, 366 U.S. 318, 6 L. ed. 2d 318, 81 S. Ct. 1243 (1961).

[14] Department of Justice Brief, dated December 4, 1964, page 14, filed January 6, 1965, in proceeding below. The Department completely abandoned this legal position, together with several other contentions, in entering into the belated stipulation.

because such acquisition had the effect of lessening competition, must result in restoration of New Company to substantially the same position it had prior to acquisition, i.e., of having enormous gas reserves in the San Juan Basin strategically located with respect to the California market. El Paso should not be permitted, in purported compliance with the decision of the Supreme Court, to place the New Company at a disadvantage insofar as being a potential competitor in the California market through denying New Company its fair share of the additional gas reserves which have been developed during the intervening eight years when El Paso had complete control of the acquisition by Pacific Northwest of gas reserves in the San Juan Basin.

"The consequences of the antitrust violation, which the Supreme Court decision was designed to rectify, *would instead be perpetuated* unless New Company is able to enjoy the fruits of the development of San Juan Basin gas reserves in which Pacific Northwest would have participated had it not been for the unlawful acquisition by El Paso of its stock." (Emphasis added).

Because of Edison's substantial requirements for natural gas for its electric generating plants, and particularly the magnitude of the increase in those requirements projected for the future, Edison has a vital interest in the restoration of such a competitive gas supply situation with reference to the California market, as existed between El Paso and Pacific Northwest, prior to the unlawful asset and stock acquisition and the illegal merger of those two gas pipeline suppliers.

El Paso's Proposed Plan of Divestiture.

Early in the divestiture hearing El Paso presented to the District Court its proposed plan of divestiture[15] which included the following:

1. The sale by El Paso, to persons satisfactory to the Court, of the stock of Westcoast Transmission Company, Ltd., which was formerly owned by Pacific Northwest and which El Paso acquired as a result of the merger, with the proceeds of such sale being retained by El Paso.

2. The formation of a new company to which would be transferred the operating properties which El Paso received from Pacific Northwest, with certain of the additions made thereto, and the stock in which would be distributed to El Paso stockholders.

3. The establishment of a contractual arrangement between El Paso and the new company providing for the sale by the new company to El Paso by exchange deliveries in the San Juan Basin of 100 million cubic feet per day of the 300 million cubic feet per day of gas which was under contract to be supplied by Westcoast Transmission Company, Ltd., for delivery at the Canadian border near Sumas, Washington.

4. The establishment of a contractual arrangement between El Paso and the new company providing, among other things, for gas gathering services by El Paso for the new company in the San Juan Basin, at a charge of 4½¢ per Mcf (compared with a charge of 1.375¢ per Mcf involved in the gathering arrangement between El Paso and Pacific Northwest prior to the merger).

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[15]El Paso's Exhibit A in the divestiture hearing entitled "Proposal for Divestiture" and dated October 13, 1964.

5. The establishment of a contractual arrangement between El Paso and the new company wherein El Paso would purchase up to 22 billion cubic feet in the first year, decreasing 4 billion cubic feet per year thereafter, of gas required by the new company to be taken from the Westcoast Transmission Company, Ltd., at the Canadian border near Kingsgate, British Columbia. These deliveries to El Paso would also be made in the San Juan Basin.

6. The establishment of a contractual arrangement between El Paso and the new company wherein the new company would deliver to Colorado Interstate Gas Company at Rock Springs, Wyoming, from its San Juan Basin resources, the remaining portion of some 30 billion cubic feet of gas which Colorado Interstate paid Pacific Northwest for in 1957 and 1958 for delivery to be made at a later date.

7. Allocation of reserves in the San Juan Basin which, including leaseholds and gas purchase contracts, purportedly total 2.518 trillion cubic feet, as of January 1, 1964, and which, when added to the other Rocky Mountain supplies and the supplies under the Canadian gas purchase contracts allocated to the new company, would purportedly create a reserve situation for the new company as of January 1, 1964, of 7.6684 trillion cubic feet.[16]

[16]El Paso Exhibit A, Proposal for Divestiture dated October 13, 1964, Tabs 7 and 8. Even these purported reserves allocated to the new company are substantially less than the reserves of Pacific Northwest as of the year of the unlawful stock acquisition of 8.47 trillion cubic feet, a time when the requirements of Pacific Northwest's system were substantially less (about 124 M^{3}cf exclusive of proposed sales to El Paso), than for the new company at the time its separate identity might become effective (about 179 M^{3}cf exclusive of proposed sales to El Paso under El Paso's Proposal for Divestiture). *Cf.*, Department of Justice Memorandum filed February 3, 1965, summarizing the Condition of Pacific Northwest at Time of Its Merger with El Paso, pages 5-7.

No provision was included for allocating any portion of the savings realized by El Paso from the substantial Pacific Northwest tax loss carry-overs, to the new company.

Opposition of United States to El Paso's Proposed Plan of Divestiture and the Subsequent Abandonment of Such Opposition.

By brief filed January 6, 1965, the United States Department of Justice expressed strong opposition and objection to *all* of the above referred to provisions of the plan of divestiture proposed by El Paso. The Department of Justice's stated basis for its opposition to such proposals by El Paso included the following:[17]

1. That El Paso's "spin-off" plan for disposition of the stock in the new company was not calculated to establish the new company as an entity independent of El Paso control.

2. That the divestiture plan failed to make any provision for the return of an appropriate portion of the reserves acquired in the San Juan Basin during the period when competition from Pacific Northwest was suppressed.

3. The divestiture plan provided for the unilateral modification of contracts which existed between the two companies at the time of the merger, to the detriment of the new company.

4. The divestiture plan failed to provide for the return of stock of Westcoast Transmission Company, Ltd., which was a Pacific Northwest asset prior to the merger.

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[17]Department of Justice Brief, filed January 6, 1965, in Court below, pages 2-3.

5. The divestiture plan failed to compensate for the substantial benefit which El Paso obtained and of which Pacific Northwest, subsequent to the merger, was deprived, arising out of the use of certain tax loss carry-overs of Pacific Northwest existing at the time of the merger.

The Department of Justice then argued for arrangements which would provide correction for *all* of the foregoing deficiencies. However, in entering into the aforesaid stipulation, after the conclusion of the hearing in the divestiture proceeding, it completely abandoned its former position on points 2-5 *supra* and acquiesced, with respect to point 1, *supra,* in a substituted spin-off arrangement which not only prevents a divestiture without delay, as directed by this Court, but also has not practically resulted in a new entity entirely independent of El Paso control.

The Questions Are Substantial.

Even a cursory analysis of the above referred to provisions of the plan of divestiture reveals a clear pattern of divestiture formulated by El Paso to render the new company impotent as a future competitor for the California market. The plan of divestiture as proposed by El Paso, and as decreed by the District Court in its order of June 24, 1965, not only provides the new company with a greatly weakened reserve position in the San Juan Basin[18] as a result of the proposed San Juan Basin reserves allocation, but additionally, by uni-

[18]Less by more than 2 trillion cubic feet of gas than before the merger while El Paso's much greater reserve position remained almost identical to what it was prior to the merger in spite of the substantial depletion through utilization and the adoption of a more conservative method of estimating reserves. Cf. Department of Justice Brief, filed January 6, 1965, pages 10, 10a and 11.

lateral contract changes during the post-merger period, renders the utilization of those reserves by the new company significantly more costly than was the utilization of those reserves by Pacific Northwest, due to the increased rate provided for gathering service and increased volumes of gas to be gathered by El Paso for the new company under the reciprocal gathering contract. In addition, the contracts providing for deliveries by the new company to El Paso of certain portions of the new company's contemplated Canadian gas deliveries, are to be, by exchange, delivered to El Paso in the San Juan Basin, thereby placing an additional burden on what limited San Juan reserves the new company will have under the plan of divestiture, thereby making even more unlikely the utilization of such reserves, which are the most advantageously located with reference to the California market, in any competitive effort by the new company to serve the California market.

In addition to the above, the plan of divestiture is effectively designed to weaken the new company's supply position in the Pacific Northwest, viz. from Canada, by depriving the new company of the benefits of the substantial stock interest in Westcoast Transmission Company, Ltd. (its Canadian supplier), which was previously enjoyed by Pacific Northwest, prior to the merger. At the same time it denies to the new company the rather substantial funds which the new company would realize if the more than one million shares of Westcoast stock were owned and sold by the new company. The availability of such funds to the new company, from the sale of this stock which it owned before the merger, obviously would enhance the new company's ability to ac-

quire additional reserves and/or finance system expansion (for instance, to serve the California market).

The new company is further weakened by depriving it from sharing in the benefits of the tax loss carryovers to which, as the Department of Justice originally maintained throughout the hearing, it was clearly entitled.

The major features of the plan of divestiture conformed to the erroneous concept of the District Judge that this Court's requirement of divestiture would be met by a proposal designed to effect "*a division of the country, a division of the market, a division of the reserves, one area to New Company and another area to El Paso.*"[19] a concept which inevitably achieves the very result, violative of the antitrust laws, which this Court in its mandate ordered divestiture to correct. In other words, the divestiture plan as now decreed by the District Court is calculated to eliminate Pacific Northwest as a competitive factor with respect to the California market — the very result which this Court determined to be the basis for the illegality of the stock and asset acquisition of Pacific Northwest by El Paso.

There can be little question but what the divestiture decree is binding on Edison, and the effect of said decree will be to perpetuate the denial to Edison and other California gas users of the competition between suppliers for that market which the Supreme Court determined the illegal stock and asset acquisition substantially lessened, thus tending to create a monopoly. Therefore, the interest of Edison, heretofore recognized by

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[19]Transcript of divestiture proceedings, December 10, 1964, page 630.

this Court, is clearly such a direct interest in the matter as to give rise to its right to intervene under Rules 24(a)(2) and 24(a)(3) under the Federal Rules of Civil Procedure.[20]

Furthermore, the Supreme Court's decision directing the District Court to order divestiture without delay (*United States of America v. El Paso Naural Gas Co., et al., supra,* 376 U.S. 657, 12 L. ed. 2d 12, 16-20) leaves no doubt that the competitive gas supply situation, with reference to the California market, which El Paso's stock acquisition and merger with Pacific Northwest unlawfully restrained (and which restraint the Supreme Court's mandate of April 6, 1964, in said proceeding, was intended to remedy) is the same competitive gas supply situation which Edison, in its Application for Leave to Intervene, in the proceedings below, claimed the right to have restored.[21] Edison was therefore entitled to permissive intervention below under Rule 24(b)(2) of the Federal Rules of Civil Procedure, and the denial of Edison's intervention by the District Court in the face of the stipulation entered into by the Department of Justice and El Paso was an abuse of discretion by the court, and such intervention would not have unduly delayed or prejudiced the adjudication of the rights of the original parties.[22]

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[20]*Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 6 L. ed. 2d 604, 81 S. Ct. 1309 (1961); *Sutphen Estates v. United States,* 342 U.S. 19, 96 L. ed. 19, 72 S. Ct. 14 (1951), reh. den. 342 U.S. 907, 96 L. ed. 679, 72 S. Ct. 289; *Ford Motor Co. v. Bisanz Bros., Inc.* (C.A. 8 Minn.), 249 F. 2d 22 (1957).

[21]See Edison's Application for Leave to Intervene filed June 22, 1965, page 4.

[22]*Allen Calculators v. Cash Register Co.,* 322 U.S. 137, 88 L. ed. 1188, 64 S. Ct. 905 (1944); reh. den. 322 U.S. 771, 88 L. ed. 1596, 64 S. Ct. 1257.

Clearly, such interest of Edison was no longer protected by the Department of Justice when, *after* submission of the case, the stipulation referred to above was entered into, such stipulation abandoning its prior powerful opposition and effectively terminating any right of appeal from the proceedings below by the Department of Justice, thereby foreclosing that means of bringing the question of compliance of the divestiture plan with the Supreme Court's mandate before this Court.

Edison is informed and believes[28] and therefore alleges that the United States Department of Justice has, subsequent to the submission of the divestiture proceedings in the District Court, taken the position that the aspects of the El Paso proposed plan of divestiture, to which it previously voiced serious objection and has since abandoned, can be adequately remedied through the exercise by the Federal Power Commission of its jurisdiction in the certificate proceedings then contemplated and now designated Federal Power Commission Dockets Nos. CP66-27, CP66-28, CP66-29 and CP66-30. That such antitrust aspects are beyond the jurisdiction of the Federal Power Commission has been heretofore recognized:

(1) by this Court, when it stated in *California v. FPC*, 369 U.S. 482, 8 L. ed. 2d 54, 58: "Other administrative agencies are authorized to enforce Section 7 of the Clayton Act when it comes to cer-

[28]See page 14 of the Department's Motion to Dismiss the State of California's and Cascade Natural Gas Corporation's appeals where the Department stated: "Thus, if California's consumers of natural gas are in fact aggrieved by an (sic) final decree of divestiture, the proper remedy lies with the Federal Power Commission in the proceeding which must be held before the new company can operate a pipeline in interstate commerce." See also, similar public statement by the Department of Justice in the New York Times of May 23, 1965.

tain classes of companies or persons; but the Federal Power Commission is not included in the list,"[24] and

(2) by the Chairman of the Federal Power Commission who has stated, in recommending new legislation on the subject to the Congress: ". . . under the rule enunciated in *California v. Federal Power Commission,* 369 U.S. 482, the Commission cannot even make its statutory determination as to whether a proposed acquisition of pipeline facilities would be required by the present or future public convenience and necessity as long as an antitrust action directed against the acquisition is pending in the courts."

Even published statements attributed to representatives of the Department of Justice reflect doubts as to the soundness of what was done.[25]

Timeliness of Edison's Application.

There can be no question of the timeliness of the filing of Edison's Application for Leave to Intervene in the proceedings below inasmuch as, prior to Edison's being apprised of the stipulation between the Department of Justice and El Paso, Edison had every reason

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[24]*Cf., United States of America v. El Paso Natural Gas Co., et al.,* 376 U.S. at pages 658-659, indicating that in an antitrust action it is irrelevant whether a company can "put together a project acceptable to the regulatory agencies".

[25]See New York Times for May 23, 1965 where a representative of Department of Justice is quoted as saying: "We were faced with two choices. Either we go ahead and fight all the way and risk having an unacceptable order entered that we would appeal. Or we get a workable separation of ownership and let the F.P.C. work out the strength of the new company.

"If we take the appeal route about two years from now it might all come back. The new company will be two years later getting started than if we get it started now. I think what we're doing is right. But I could be wrong."

to assume that its interests in having the competitive situation restored were being and would continue to be adequately represented and protected by the Department of Justice.[26] Particularly is this true in view of the previous strong opposition made by the Department of Justice, throughout the entire hearing, to the El Paso proposal for divestiture and the Department's insistence that a plan of divestiture be adopted which would restore the competitive supply situation relative to the California market, which requirement was inherent in this Court's mandate. We believe the Department was clearly justified in its original opposition and clearly wrong in abandoning it. Furthermore, the abandoned positions were not by their nature capable of being withdrawn without sacrificing this Court's mandate, notwithstanding the Department's securing partial acquiescence on one position, *i.e.,* the "spin-off." Within a reasonable time after being apprised of the aforesaid stipulation, Edison on June 22, 1965, filed its application with the District Court to intervene in the divestiture proceedings in order to protect its proper interests.

Conclusion.

In view of the foregoing it is submitted (1) that the plan of divestiture incorporated in the District Court's decree of divestiture entered June 24, 1965, utterly fails to carry out the mandate of the Supreme Court in its order of April 6, 1964; (2) that the Supreme Court has plenary power to see that its mandate is carried out when brought to its attention in any proper

[26] *Cf. Pellegrino v. Nesbit,* CA 9th, 1953, 203 F. 2d 463; *Wolpe v. Poretsky,* 1944, 144 F. 2d 505; cert. den. 323 U.S. 777, indicating that in proper circumstances even a petition to intervene filed after entry of judgment is timely.

way,[27] (3) that the stipulation by the United States does not and could not circumvent this Court's power to see that its mandate is carried out;[28] and (4) that in view of the stipulation between El Paso and the United States the only way in which the failure of the District Court's decree to carry out this Court's mandate can be brought officially to this Court's attention is through the granting by this Court of appellate review of the pending appeals (including this appeal) from the District Court's denial of Applications For Leave to Intervene in the proceedings below. Unless the pending appeals to this Court, by those opposing such antitrust features of the El Paso plan of divestiture approved by the District Court, are heard, such parties will have been denied, by the complete abandonment by the Department of Justice of its opposition to such antitrust features, the opportunity to have them tested in any forum whatsoever.

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[27] *Continental Ins. Co. v. U.S.*, 259 U.S. 156, 166, 66 L. ed. 871, 881, 42 S. Ct. 540 (1922) and *United States v. DuPont De Nemours & Co.*, 366 U.S. 316, 324-325, 6 L. ed. 2d 318, 324, 81 S. Ct. 1243 (1961).

[28] *Continental Ins. Co. v. U.S.*, 259 U.S. 156, 166, 66 L. ed. 871, 881, 42 S. Ct. 540 (1922) and *United States v. DuPont De Nemours & Co.*, 366 U.S. 316, 325, 6 L. ed. 2d 318, 324-325, 81 S. Ct. 1243 (1961).

Consequently, as matters stand, and if the decree of divestiture is not set aside by this Court, while El Paso lost the battle in *United States of America v. El Paso Natural Gas Co., et al., supra,* it will have "won the war" by a plan which divides the market in a way which effectively undercuts and nullifies the judgment of this Court in *United States v. El Paso Natural Gas Co., et al., supra,* with consequent substantial prejudice to the interests of Edison recognized by this Court therein. It is further submitted, based on the arguments and authorities presented in the foregoing jurisdictional statement, that the District Court erred in denying Edison intervention in the proceedings below.

We respectfully urge that this Court should note proper jurisdiction of this appeal in order to correct such errors of the District Court and to effectuate the carrying out of this Court's mandate, in its order of April 6, 1964, under its plenary power.

Respectfully submitted,

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HARRY W. STURGES, JR.,
WILLIAM E. MARX,

By /s/ ROLLIN E. WOODBURY

Attorneys for Appellant, Southern California Edison Company.

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FRANCIS M. GIBBONS.

APPENDIX A.

[Endorsed]: Filed in United States District Court, District of Utah. June 28, 1965.

Andrew John Brennan, Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 143-57

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,

Defendants.

Order.

It is Ordered that the application for leave to intervene filed herein on June 22, 1965, by Southern California Edison Company be and it is hereby denied.

Dated: June 28, 1965.

/s/ Willis W. Ritter
Willis W. Ritter
Chief Judge

[Filed in United States District Court, District of Utah. Time: June 24, 1965. Andrew John Brennan Clerk.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 143-57

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,

Defendants.

Decree for Divestiture.

Plaintiff filed its complaint herein on July 22, 1957, and its amendment thereto on October 31, 1960. Defendants appeared and filed their answer on November 12, 1957. The action was tried by this Court and on November 20, 1962, a judgment was entered dismissing the action. Plaintiff appealed from the judgment. On April 6, 1964, the Supreme Court of the United States reversed the judgment of this Court and directed it to order divestiture without delay. The mandate of the Supreme Court of the United States was filed in this Court on May 5, 1964. This Decree for Divestiture is for the purpose of establishing an independent gas pipeline company capable of providing future competi-

tion to El Paso and other natural gas pipeline companies. This Decree for Divestiture has been agreed to by the parties after extensive hearings and conferences and the Court.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed:

I.

As used in this Decree:

(A) "El Paso" shall mean the Defendant El Paso Natural Gas Company;

(B) "Pacific Northwest" shall mean the Defendant Pacific Northwest Pipeline Corporation;

(C) "Person" shall mean an individual, partnership, firm, corporation, association or other legal or business entity;

(D) "Immediate family" shall mean, with reference to any person, the spouse, descendants, ascendants and/or brothers and sisters of such person;

(E) "Natural gas transmission properties" shall mean properties used in the transportation of natural gas by pipeline (other than production, gathering and processing).

II.

In accordance with the mandate of the Supreme Court, this Court finds the acquisition by El Paso of the capital stock and assets of Pacific Northwest is a violation of Section 7 of the Act of Congress of October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, as amended.